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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 463

JOHN D. JOHNSON,

Petitioner,

—v.—

NOVA F. STUCKER, Superintendent of the Kansas State Industrial Reformatory,

Respondent.

PETITIONER'S REPLY BRIEF

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I.

This case is not moot.

Respondent's first and major point in urging that certiorari should not issue in this case is that "The Petition is Moot Because Johnson is No Longer Institutionalized" (Resp. Br. p. 7), and "There 'is no subject-matter on which the judgment of this Court could operate. . . .'" (Resp. Br. p. 8). This contention is mistaken. The record and briefs agree that petitioner was placed on parole August 16, 1966, and that parole was revoked in the proceedings which gave rise to this petition on July 25-26, 1967. (Pet. Br. pp. 1, 2; Resp. Br. pp. 6, 7).

The laws of Kansas pertinent to this point provide:

". . . When a prisoner on parole or conditional release has performed the obligations of his release for such time as shall satisfy the board that his final release is not incompatible with the best interest of society and the welfare of the individual, the board may make a final order of discharge and issue a certificate of discharge to the prisoner; *but no such order of discharge shall be made in any case within a period of less than one year after the date of release* except where the sentence expires earlier thereto. Such discharge, . . . shall have the effect of restoring all civil rights lost by operation of law upon commitment, and the certificate of discharge shall so state. . . ." K. S. A. 62-2252 (1957) (italics added).

Petitioner's position before the parole revocation was that he had worked his way to within twenty-two days of eligibility for final discharge, and restoration of his civil rights, with all this implies. In August, 1969 petitioner's petition for certiorari was filed and served upon respondent. Then, as respondent's brief informs us, "On September 9, 1969, a *second parole* was granted . . . to Johnson." (Resp. Br., p. 8) (italics added). After that action, petitioner was again a full year away from eligibility for consideration for discharge and restoration of his civil rights, instead of 22 days away, because he had had his first parole revoked in a proceeding repugnant to the United States Constitution on the grounds raised in his petition for certiorari. Petitioner should at this very moment be eligible for consideration for discharge and restoration of civil rights; instead, because of the invalid and unconstitutional revocation of his first parole, he is denied by Kansas statute this eligibility until

September 9, 1970. It is possible this period of parole could stretch to 1974.

Thus petitioner is still subject to the severe handicaps placed upon a parolee by the State of Kansas:

> "It must be remembered our statute, in clear and unequivocal terms, provides that a convict on parole, although permitted to go outside the prison walls, is still in legal custody and subject at any time to be taken back within that institution. The authorities hold that under such a statute a parolee is still in *custodia legis,* he is subject to the rules and regulations of the penitentiary from which he has been paroled even though permitted to remain outside its walls, and he is subject to the direction and control of the authorities placed in charge of that institution.
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> * * * * *
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> In revoking petitioner's parole, in ordering his arrest, and in having him brought back to the penitentiary the respondent was simply performing powers and duties of prison discipline and management conferred upon him by statute." *Ex Parte Tabor,* 173 Kan. 686, 250 P. 2d 793, 797 (1952).

This is the law of Kansas to this day. (See *Hunt* v. *Hand,* 186 Kan. 670, 352 P. 2d 1, 2, 3 (1960), to the effect that the revision of some of the Kansas statutes since 1952 had not impaired this view.) The continuation of such substantial burdens on a prisoner because of unlawful action by the state renders this action very much alive.

Moreover, this action is not moot because there is "subject-matter on which this Court can operate" to accom-

plish specific relief for petitioner. Should this Court find that petitioner's parole was unconstitutionally revoked, it should place him insofar as possible in the position in which he would otherwise have been. This would require an order that the Kansas Parole Board consider petitioner eligible for parole now instead of September 9, 1970 without any prejudice resulting from his reincarceration in July, 1967. The result of a favorable ruling in this Court would therefore be: (1) petitioner could be considered for immediate parole, and (2) the Kansas Parole Board would be obliged to ignore the parole revocation, the grounds upon which it was based, and the period of petitioner's reincarceration. Petitioner could be released from parole altogether and his full civil rights restored following immediate consideration by the parole board. When so substantial a result can flow from the decision of this Court in this case, there can be no argument that this case is moot.

The loss of the right to be discharged from parole status and to be a free man with full civil rights for a period of nearly 49 months (July 25, 1967–Sept. 9, 1970) less 22 days, is clearly a matter of sufficient moment that prevents this case from being moot. After being served the petition for certiorari in this case, the state released petitioner. The state should not be allowed to save a procedure rife with unconstitutional features by blithely releasing a prisoner to suffer the prejudice that has clearly resulted from the parole revocation at issue here. This Court should invalidate the Kansas parole-revocation procedure and order that petitioner be considered eligible for parole.

II.

All the points raised by petitioner in this Court were considered by the Kansas Supreme Court.

Respondent's brief (9-11) claims that "broad" due process arguments were not raised in the state courts, that the petitioner argued only that the parole board was "arbitrary and capricious," not that it violated the Fourteenth Amendment. Assuming, as respondent does, that those two arguments are radically distinct, it is clear from the opinion of the Supreme Court of Kansas (Pet. for Cert., Appendix) that all of the elements of fairness specified in the Sixth Amendment (Pet. for Cert. 9) were considered in the state court:

—The state court held that *no* constitutional right is involved, in *any* parole-board case (App. 7a).

—The state court adopted the same *broad, negative* position on the federal Constitution which the Washington state court adopted in *Mempa;* parole, the Kansas court said, "must be measured, not by legal rules, but by the judgment of those who make it their professional business." (App. 6a-7a.)

—Every point in the petitioner's first argument (Pet. for Cert. 6-11) is based on the Sixth Amendment, which was fully argued in the state court and discussed and rejected there, in favor of statutory guidelines (App. 7a-9a). Every one of the constitutional safeguards is rooted in and implemented by the right to counsel. *Townsend* v. *Burke*, 334 U. S. 736 (1948), discussed by the state Supreme Court at App. 6a.

—The state court's opinion on the issue of appropriate remedy (App. 10a-11a) turns on whether the parole board's decision was arbitrary or capricious, and on that court's presumption of correctness as to parole-board procedures. Fundamental fairness is the basis for the state court's discussion, for the petitioner's first argument, and for the Fourteenth Amendment. For example, both the state court (App. 7a) and the petitioner (Pet. for Cert. 10) point this Court to the controlling decision in the federal Court of Appeals which sits for Kansas—*Gonzales* v. *Patterson*, 370 F.2d 94 (10th Cir. 1966); that decision holds that there is no due process limitation—"from a broad viewpoint" (Resp. Br. 9)—on state parole boards. It is a decision in conflict with other Courts of Appeal (Pet. for Cert. 10-11).

Respondent claims that the third issue in petitioner's brief (Pet. for Cert. 22-23) was not presented below. It was. Petitioner's claim is that his parole may not be revoked solely because he has been accused and acquitted of a new crime. Respondent's contention that this point is new in this case is based on the double jeopardy rationale for this point included in petitioner's brief. The Kansas Supreme Court decided this point as a due process question when it recognized that the factual basis on which a parole board acts is a due process question and cited *Townsend* v. *Burke*, 334 U. S. 736, in support of its conclusion (Pet. for Cert., App. 6a). Just before the petition for certiorari in this case was filed this Court decided *Benton* v. *Maryland*, 395 U. S. 784 (1969) which held that the due process clause of the Fourteenth Amendment com-

prehends double jeopardy. It therefore seemed appropriate to bring this issue to the attention of this Court in this case, but we stand on the due process basis upon which this point was explicitly decided by the Kansas Supreme Court.

III.

Petitioner relies only on the record that was before the Kansas Supreme Court.

Respondent's brief (p. 11) complains that the transcript of the state district court was not before the state supreme court. The claim is erroneous. Most of the record below consists of this same transcript (R. 3-27, pleadings; R. 28-35, testimonial record). Because the abstracted testimonial record in the state Supreme Court was not complete, petitioner filed a *complete* transcript from the state trial court after requesting the advice of the Office of the Clerk of this Court by phone. However, no essential argument advanced by petitioner rests on this separate transcript. All material facts are in the state supreme court's transcript, and all of the petitioner's quotations from the record (see Pet. for Cert. 4) come from it (R. 29-34).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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